IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 1724 OF 2004
WITH
CIVIL APPLICATION NO. 2844 OF 2004
AND
CIVIL APPLICATION NO. 5248 OF 2004
WITH
CIVIL APPLICATION NO. 5250 OF 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.N.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

LALITABEN WIDOW OF RATILAL PUNJABHAI PATEL

Versus

SUSHIL CORPORATION

Appearance:

MR AJ PATEL WITH
MR SHEETAL R PATEL for Petitioner No. 1
RULE SERVED for Respondent No. 1,2,3/1-4
MR NANDLAL THAKKAR for Respondent No. 2
..... for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE D.N.PATEL

Date of decision:-26/11/2004

C.A.V. JUDGEMENT

1. By way of the present petition under Article 227 of the Constitution of India, the petitioner has challenged the common order passed by the 3rd Jt. Civil Judge (SD), Ahmedabad (Rural) below Exhs. 117 and 119 in Regular Civil Suit No. 25 of 1984.

2. In the present petition Rule has been issued by this Court (Coram : Ms. R.M. Doshit, J) and ad-interim relief was granted in favour of the petitioner. The respondent herein requested this Court to hear the petition on the point of ad-interim injunction. In the facts and circumstances of the case and with the consent of the learned advocates for both the parties, the present petition is taken up for hearing today.

3. The petitioner is a judgment debtor in Regular Civil Suit No. 25 of 1984 which was filed for specific performance of the contract and the said suit was allowed and decreed on 18-6-1993. It appears from the record that the judgment creditor was required to deposit balance amount of sale consideration in the trial Court within 30 days from the date of decree. The judgment creditor vide application Exh.110 applied for extension of time wherein the trial Court issued process to the judgment debtor including the present petitioner. The present petitioner is a widow of Ratilal Punjabhai Patel who was also served with the summons issued by the Court and appeared through the advocate and applied for time for filing reply vide Exhs. 111 and 112 to the application Exh.110.

4. The present petitioner who is the wife of Ratilal Punjabhai Patel expired on 5-4-2000. the respondent No. 4 Nitin Ratilal Patel is the son of the petitioner. The respondent Nos. 3/2 and 3/1 are brothers of Ratilal Punjabhai Patel who were served with the summons issued by the Court as to the applications Exh.110, 117 and 119 but did not appear thought served and therefore an ex-parte order was passed . The respondent Nos. 1 and 2 are the judgment creditors who have filed the application Exh.110 for extension of time.

5. As per the judgment and decree passed in the aforesaid suit, the judgment debtor was directed to obtain permission from the appropriate authority within one month to sign the relevant documents and thereafter to execute the sale deed as per the decree. It is an admitted position that the judgment debtor from 18-6-1993 to 18-7-1993 has failed to act as per the first part of

the decree and as per the second part of the decree the judgment creator was required to deposit balance amount of sale consideration of the property within a period of one month from 18-6-1993. The judgment debtor failed to act as per the first part of the decree and did not comply with the first part of the decree. Therefore, the judgment creditor filed an application Exh.110 for extension of time on 5-8-1993 in which the respondent No.3 was served with the notice.

6. It appears from the record that the deceased Ratilal Punjabhai Patel has not filed any reply in the matter till he expired on 5-4-2000. Not only that but the judgment debtor has not moved the trial Court by way of filing proper application under the provisions of Section 28 of the Specific Relief Act, which reads as under :

"Sec.28 - Rescission in certain circumstances of contracts for sale or lease of immovable property the specific performance of which has been decreed:

(1) Wherein any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser of lese does not, within the period allowed by the decree or such further period as the Court may allow, pay the purchase-money or other sum which the Curt has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the Court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require;

(2) Where a contract is rescinded under sub-section (1), the Court -

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor

or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendor or lessee as earnest money or deposit in connection with the contract.

(3) If the purchaser or lessee pays purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the Court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely :

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery or possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this Section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be;

(5) The costs of any proceedings under this section shall be in the discretion of the Court.

7. Ultimately, the trial Court granted time to deposit money vide order dated 26-8-2002 passed below the application Exh.110. The judgment creditor deposited the balance amount of sale consideration on 3-9-2002 and this fact is not disputed by the parties.

8. Thereafter, the judgment creditor filed Execution

Petition No. 120 of 2002 before the Executing Court namely Civil Judge (SD), Ahmedabad (Rural) against the judgment debtor and the respondent Nos. 3 and 4 namely Nitin Ratilal Patel and Lalitaben wife of the deceased Ratilal Punjabhai Patel were served with the summons. The petitioner and the respondent no. 4 appeared himself and for and on behalf of his mother as power of attorney holder.

9. The respondent No.4 Nitin Ratilal Patel is the son of deceased Ratilal Punjabhai Patel and Lalitaben wife of deceased Ratilal Punjabhai Patel is the petitioner of the present petition. Thus, time for extension was within the knowledge and information or the heirs of deceased Ratilal Punjabhai Patel when they were served. Both the judgment debtors have filed their reply in the execution proceedings on 19-2-2002 raising contentions regarding extension of time granted by the trial Court.

10. In the execution proceedings, the present petitioner and the respondent No. 4 have also filed an application Exh.29 challenging legality and validity of the order passed by the trial Court below the application Exh.110.

11. Learned Judge of the Executing Court after hearing the parties passed the oral order on 25-3-2003 below Exh.1 and the objection application Exh.29 filed by both the judgment debtors. The copy of said order is annexed with the memo of Special Civil Application No.4292 of 2004. The Executing Court passed the order below the application Exh.1 for appointment of Court Commissioner as per the decree passed by the trial Court and rejected the application Exh.29.

12. Nitin Ratilal Patel son of the deceased Ratilal Punjabhai Patel filed Civil Revision Application No.130 of 2002 on 4-4-2003 challenging the order passed by the Executing Court below the application Exh.1 and Exh.29 and all the execution proceedings were stayed. But the order of extension of time passed by the trial Court below the application Exh.110 was not challenged in the said revision application but only execution proceedings were challenged. The Revision Application though was heard on merits of the case was withdrawn by the present petitioner on 23-2-2004 as it was not maintainable under Section 115 of the Civil Procedure Code.

13. Thereafter another Special Civil Application was filed before this Court challenging the review order

passed by the 3rd Jt. Civil Judge (SD), Ahmedabad (Rural). Both the petitions came to be admitted by this Court and rule has been issued and ad-interim relief has also been granted.

14. The respondent of the present petition has filed a reply to vacate ad-interim relief granted in this matter. The petitioner again filed Civil Application No.2844 of 2004 on 7-2-2004 in the present petition and in the said civil application stay was granted vide order dated 7-2-2004.

15. Learned advocate for the petitioner vehemently submitted that the orders passed below the applications Exhs. 110, 117 and 119 are illegal and erroneous and contrary to facts and evidence on record and hence the same require to be quashed and set aside. He has further submitted that the amount as directed by the trial Court is not deposited within the stipulated time and the time extended by the trial Court at belated stage is illegal.

16. Learned advocate for the petitioner further submitted that the application for extension of time has been granted by the trial Court after pretty long time and the order passed by the trial Court below the application Exh.110 is illegal and erroneous. The trial Court has erred in passing the order below the application Exh.110 and hence the same deserves to be quashed and set aside. He has also submitted that the respondents herein were not served with the notice as to the application Exh.110 and hence the the impugned order below the application Exh.110 is illegal and does not stand in the eye of law. He also submitted that the order dated 26-8-2002 passed below the application Exh.110 is of two lines order.

17. Learned advocate for the petitioner contended that extension of time for payment of money which was required to be made within one month was granted in 2002 without serving the notice of extension of time application on the parties which wee going to be affected. He has also contended that whether the trial Court took into consideration the review application filed before him when no notice was served as emerging from the record of the case and could have passed the order of the time for payment of money in respect of the application Exh.110 filed on 5-8-1993. He has contended that the judgment creditor was required to deposit balance consideration within one month from the date of the decree which he failed to deposit and hence extension of time could not have been granted. He has also

submitted that the said application is purported to have been drafted on 4-8-1993 and it was presented on 5-8-1993. It appears from the record that the trial Court issued the notice to the defendants. Since the order to issue the notice was passed, no interim order was sought. He has further submitted that the judgment creator has grossly failed to obtain the order for extension of time within the time prescribed under the law and since the order of extending the time passed by the trial Court is illegal and erroneous, the same deserves to be quashed and set aside.

18. Learned advocate for the petitioner next contended that the petitioner has filed review application vide Exhs. 117 and 119 against the order passed by the trial Court for review of the order but the learned trial Judge has grossly failed to review the order. The order passed below the applications Exhs. 117 and 119 is also illegal and erroneous. In support of his arguments, learned advocate for the petitioner relied on the decision of the Hon'ble Supreme Court reported in A.I.R. 1966 SC 1631.

19. Learned advocate also submitted that the petitioner has filed First Appeal being Stamp No.438 of 2004 against the judgment and decree dated 18-6-1993 passed by the 3rd Jt. Civil Judge (SD), Ahmedabad (Rural) in Civil Suit No .25 of 1984. In the said First Appeal, Civil Application No. 1415 of 2004 was also preferred for condonation of delay and the said delay condonation application was rejected on 1-3-2004.

20. Learned advocate for the petitioner submitted that the petitioner has also filed Special Civil Application No.4292 of 2004 challenging the order passed by the Executing Court in Execution Petition No.120 of 2002. Special Civil Application No.4292 of 2004 has also been admitted and it is tagged with the present petition. He has also submitted that in view of the amendment made in the provisions of the Civil Procedure Code, the application for extension of time is required to be granted only within 30 days' time. He has further contended that the application for extension of time was filed by the judgment creditor within the time prescribed under the law but the order was passed by the trial Court on 26-8-2002. He has also submitted that the order passed by the trial Court below the application Exh.110 is illegal and erroneous and is not sustainable in the eye of law in view of the provisions of Section 148(A) of the Civil Procedure Code. In these circumstances, the impugned order is required to be quashed and set aside in

exercise of extra ordinary jurisdiction under Article 227 of the Constitution of India.

21. Learned advocate for the respondents submitted that the impugned orders passed below the applications Exhs. 117 and 119 in Regular Civil Suit No. 25 of 1984 are true, correct, proper and in consonance with the facts and law and deserves no interference by this Court in exercise of the powers u/s 227 of the Constitution of India. It is also contended by the learned advocate for the respondents that the judgment debtor i.e. the present petitioner has not taken any steps to rescind the contract u/s 28 of the Specific Relief Act, 1963. It is also contended by the learned advocate for the respondents that the civil revision application was filed on 4-4-2003 but has not challenged before this Court the order extending the time. The petitioners have not challenged the order passed by the Executing Court in the aforesaid execution proceedings and therefore the petitioners cannot raise the said point after lapse of considerable long period and that too after filing of the execution proceedings. It is also contended by the learned advocate for the respondents that against the order passed by this Court on 1-3-2004 in Civil Application No. 1415 of 2004 in First Appeal (Stamp) NO.438 of 2003, Special Leave Petition (Civil) No.17543 of 2004 was filed before the Hon'ble Supreme Court and the same has been dismissed by the Hon'ble Supreme Court vide order dated 6-9-2004. Thus, the decree which was challenged in the First Appeal remains intact in favour of the respondents.

22. I have heard the learned advocates for both the sides.

23. It is emerging out from the record of the case that in spite of appearance of deceased Ratilal Punjabhai Patel on 15-7-1995 through the advocate and the application Exh.112 was given for filing reply and the reply was not filed till the order for extension of time was passed on 28-8-2002. Though said Ratilal Punabhai expired on 5-4-2000 no step is taken or no reply is filed till he expired on 5-4-2000. As per Section 28 of the Specific Relief Act, 1963 statutory duty is cast upon the judgment debtor to take necessary steps if decretal amount is not deposited within the stipulated time. As per the provisions of Section 28 (1) of the Specific Relief Act, 1963, the judgment debtor has failed to apply to the trial Court to rescind the contract. Therefore, the order passed by the trial Court extending the time is in accordance with law and no interference is called for

by this Court under Article 227 of the Constitution of India.

23.1 A registered notice was issued to the deceased Ratilal Punjabhai Patel and the same was served upon him on 5-8-1993 which is also produced vide mark 21/1 in the proceedings of Execution Petition No. 120 of 2002. Simultaneously, that application for extension of time was given. It is an admitted position in the aforesaid execution proceedings that the said notice is received by the judgment debtors and postal A.D. Slip is also produced on the record of the execution proceedings.

23.2 As per the first part of the decree, the judgment debtor was required to comply with the order within one month from the date of the decree but he failed to do so till today and hence he has no locus standi or any right to file the present petition and in view of the law of equity to challenge the order of extension of time. It was within the knowledge of the present petitioners about the extension of time on 19-10-2002 when reply was filed by the present petitioner and the respondent no. 4 in the proceedings of Execution Petition No. 120 of 2002. Even though the said order passed below the application Exh.110 was not challenged by way of any revision application or appeal before any court of law, save and except civil revision application which was filed on 4-4-2003. In view of the above factual position, the learned trial Judge summarily rejected the review application by passing the order below the application exhs.117 and 119 on merits and hence this Court under Article 227 of the Constitution of India cannot reexamine the said facts. Learned advocate for the respondents further submitted that the present petition is agitating the same point which was raised in the aforesaid execution proceedings vide Exh.29 which was also rejected by the Executing Court by passing a speaking order. The revision application was filed on 4-4-2003 but has not challenged before this Court the order extending the time. The petitioner has only challenged the order passed by the Executing Court in the aforesaid execution proceedings and hence at this belated stage the petitioner cannot raise the said point after pretty long time and after filing execution proceedings in accordance with law. Learned advocate for the respondent has further submitted that the judgment debtors namely Jayantilal Punjabhai Patel and Chamanlal Punjabhai Patel have not challenged the said order of the trial Court extending the time passed below the application Exh.110 by preferring any revision application or appeal in any court of law except Special Civil Application No. 4292

of 2004 filed by all the judgment debtors namely (i) Lalitaben wife of Ratilal Punjabhai Patel and (ii) Nitin Ratilal Patel son of the deceased Ratilal Punjabhai Patel. It is submitted that Chamanlal Punjabhai Patel and Jayantilal Punjabhai Patel who have filed Special Civil Application No.4292 of 2004 challenging the order passed in the aforesaid execution proceedings. The said Special Civil Application No. 4292 of 2004 is not maintainable at law and hence both the petition deserves to be dismissed.

23.3 Learned advocate for the respondent submitted that the order of the trial Court is complied with by the respondent and the proceedings have already been proceeded further in accordance with law and the decree of the trial Court and the order for appointment of Court Commissioner is passed and the Court Commissioner is appointed and therefore I do not see any good ground for interference of this Court under Article 227 of the Constitution of India.

23.4 The petitioner has challenged the said decree by way of filing First Appeal before the Division Bench of this Court along with Civil Application No. 1415 of 2004 in First Appeal (Stamp) No. 438 of 2003 and this Hon'ble Court (Coram: K.R. Vyas and M.C. Patel, JJ.) vide order dated 1-3-2004 rejected the First Appeal and the said application for condonation of delay was rejected. Against that order Special Leave Petition (Civil) No. 17543 of 2004 has also been preferred by the present petitioners and the same has also been dismissed by the Hon'ble Supreme Court vide order dated 6-2-2004. The relevant paragraph of the said order pertaining to the order passed below Civil Application No.1415 of 2004 filed by the petitioner was rejected by the Division Bench of this Court. the relevant portion of the said order reads as under :

"Having heard the learned counsel and perused the application, we see no merits in the submissions advanced on behalf of the applicants. Merely because the trial Court granted the application Exh.110 at a later stage, that fact by itself would not constitute a reason for condonation of inordinate delay caused in filing the appeal. The judgment and decree dated 5-8-1993 which is required to be challenged within a period of limitation, is admittedly not challenged in time, and instead, delay is sought to be explained on decision rendered in the application Exh.110, which is not permissible. Assuming that the same

is sufficient cause, there is no justification to file the appeal after the period of 18 moths from the date of decision of Exh.110 on 26-8-2002. Suffice it to show that on the facts and circumstances of the case, there is no "sufficient cause" shown on the face of the application. This application, is therefore, rejected."

This order was also challenged in Special Leave Petition (Civil) No.17543 of 2004 by the present petitioner and the same has been dismissed by the Hon'ble Supreme Court vide order dated 6-9-2004.

23.5 The authorities cited by the learned advocate for the petitioner are not applicable to the present case and only contended about extension of time and no other issue has been discussed in the said authorities. As regards the authorities cited and relied upon by the learned advocate for the petitioner, it is clear from the said order passed by the trial Court below the application Exh.110 that extension application was filed after period of five years. While the application Exh.110 is within stipulated time and hence the said authorities relied upon by the learned advocate for the petitioner are not relevant so far as the present petition is concerned and the same are not applicable in the present case.

24. The learned advocate for the respondent has relied upon the following authorities:

i. AIR 1994 SC 1699
ii. 1996 (11) SCC 228
iii. 1971 G.L.R. SC 55
iv. 1996 (2) GLH 836
v. 1996 G.L.H. (UJ) 14
vi. 1992 (1) G.L.R. 577

25. I have gone through the aforesaid authorities relied upon by the learned advocate for the petitioner and the learned advocate for respondent. The facts of the present case and the facts of the case/s in the aforesaid authorities are different and do no match with each other. Therefore, the aforesaid authorities are not applicable in the present case.

26. In view of the provisions of Section 28 of the Specific Relief Act, 1963 time for extension is granted in accordance with law and hence the impugned order of the trial Court is just, proper and legal. No interference is called for by this Court in exercise of

extra ordinary jurisdiction under Article 227 of the Constitution of India. Looking to the records of the case, the orders passed by the various courts on the same point and the same has been rejected after perusing the record and considering the submissions of the learned advocates for the parties.

27. The Division Bench of this Court rejected Civil Application No.1415 of 2004 filed by the present petitioner in First Appeal against the judgment and order passed in Special Civil Suit No.25 1984 and below the application Exh.110 and the said appeal has also been rejected. The authorities relied upon by the learned advocate for the petitioner do not support the case of the petitioner as the same are not applicable in the present case.

28. The judgment of the Division Bench of this Court reported in 1996 (2) G.L.H. (UJ) 14 relied upon by the learned advocate for the respondent pertains to the review application, wherein it is held that the delay caused in filing the review application does not require any consideration and it is applicable to the case of the present respondent.

29. There is no perversity in the order passed by the trial Court nor there is any jurisdictional error much less there is an error on the face of the record. Therefore, I see no reason, in exercise of the powers conferred under Article 227 of the Constitution of India, to interfere with the order passed by the trial Court.

30. In the result, there is no substance in the present petition. Therefore, this petition is dismissed. Rule is discharged. There shall be no order as to costs. Interim relief granted by this Court in the present petition as well as in Civil Application No.2844 of 2004 in Special Civil Application No. 1724 of 2004 is vacated.

31. In view of the aforesaid order passed in the main petition, no order is required to be passed in Civil Application No. 2844 of 2004, Civil Application No.5248 of 2004 as well as in Civil Application No. 5250 of 2004 and all three applications stand disposed of accordingly.

(D.N. Patel, J.)
_/\/Satwara/

After pronouncement of the aforesaid judgment, learned advocate for the petitioner requested this Court

to stay implementation, execution and operation of the order for 8 weeks as the petitioner wants to approach the higher forum against the aforesaid judgment. Looking to the facts and circumstances of the case, the prayer made by the learned advocate for the petitioner is refused.

Date:-26-1-2004. (D.N. Patel, J.)